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IN THE

Supreme Court of the United States

October Term, 1956

No. ~~1153~~ 253

RONALD MILLER, ET AL,
Petitioners,

v.

ROBERT W. JENNINGS, ET AL,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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May It Please the Court:

Petitioners Ronald Miller and others would respectfully show the Court the following:

A. Opinion Below

The opinion of the Court of Appeals, one judge dissenting, is reported in 243 F. 2d 157, and in the appendix to this petition, beginning at Page A-17 hereof.

B. Statement of Jurisdiction

The judgment sought to be reviewed was entered April 12, 1957. No rehearing has been sought. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 28 U. S. C. Section 1254(1).

C. Questions Presented

1. Plaintiffs seek a declaratory judgment and injunction to determine and protect their rights to the use of the water of a river. Plaintiffs seek to join the United States as a party defendant under a statutory consent to joinder in "any suit" for the adjudication or administration of rights to the use of water of a river system or other source. The Court of Appeals held, however, that the statutory phrase "any suit for the adjudication of water rights" is a phrase of art which means "only a suit" so framed as to bring personally before the Court all persons who have rights to the use of the waters of the river.

The first question presented then is this: Must the statutory consent to joinder of the United States in "any suit" be construed so finely as to deny consent where the controversy does not involve all the water users on the river?

2. All the waters in controversy are physically possessed and controlled by the defendant Reclamation officials whom plaintiffs seek to enjoin. Several thousands of upstream landowners, whose lands are served by the facilities of the Reclamation Project,

have interests adverse to plaintiffs in the water controlled by such Reclamation officials. Plaintiffs seek to join such adverse claimants by representation in a class action. The Court of Appeals held that such attempted joinder was ineffective and that each of the thousands of adverse claimants must be personally served with process.

Thus is the second question presented: When the judgment sought will effectively dispose of the property is controversy, and the claimants thereto are too numerous to bring them all personally before the court, may a Federal Court resolve the controversy in a class action?

D. Statute Involved

The statute involved (herein called the "Consent Statute") is Section 208 of the Act of July 10, 1952, 62 STAT. 560, 43 U.S.C.A. Section 666, reading as follows:

> "(a) Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgment, orders, and decrees of the court

having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

"(b) Summons or other process in any such suit shall be served upon the Attorney General or his designated representative.

"(c) Nothing in this Act shall be construed as authorizing the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream."

E. Statement of the Case

The Rio Grande Federal Reclamation Project is owned by the United States Government and is operated by officials of the Bureau of Reclamation for the purposes of impounding and distributing, primarily for irrigation, the waters of the upper Rio Grande River. The waters are impounded by Elephant Butte Dam in New Mexico, about 125 miles upstream from the City of El Paso, and are distributed through a series of ditches. Seepage and return flow waters are used and sometimes reused. The Project serves an area extending from Elephant Butte Dam nearly to Fort Quitman, Texas, about 85 miles downstream from El Paso. Substantially all the irrigable lands within this area lie within the confines of three irrigation districts: The farthest upstream is Elephant Butte Irrigation District of New Mexico, lying wholly in New Mexico; the farthest downstream of the district is the

Hudspeth County Conservation and Reclamation District No. 1, within Hudspeth County, Texas; between these is El Paso County Water Improvement District No. 1, within El Paso County, Texas.

During recent years the watershed of the upper Rio Grande has been afflicted with a severe drouth. Beginning in 1951, as a "conservation" measure, the Reclamation officials cut off the flow of water to the landowners of Hudspeth District, to their great distress and loss, and diverted to landowners within Elephant Butte and El Paso Districts (herein called "Project" Districts), and to a Federal prison farm in El Paso County, the waters which had formerly been used by the Hudspeth farmers.

The Hudspeth farmers brought suit in 1952 against the Reclamation officials for a determination of their rights and for injunction against further interference. However, in *Hudspeth County C. & R. District No. 1 v. Robbins*, 213 F. 2d 425 (CA 5, 1954), cert. denied, 348 U.S. 833, the 1952 action was dismissed for lack of jurisdiction. The Court of Appeals there held the United States to be an indispendable party, concluding, in effect, that *United States v. Lee*, 106 U.S. 196; *Ickes v. Fox*, 300 U.S. 82, and *Land v. Dollar*, 330 U.S. 731, had been overruled by *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682.

Thereupon this action was commenced by the Hudspeth District and five individual landowners as representatives of all the landowners of Hudspeth District. Defendants are (a) the Regional Director of the Reclamation Bureau and the Manager of the Rio Grande Project; (b) eleven individual up-

stream landowners, all of whom are sued individually and as representatives of upstream landowners whose interests are adverse to plaintiffs in the waters of the Rio Grande controlled by the defendant Reclamation officials; (c) El Paso District and its manager; and (d) the United States Government.

Plaintiffs seek a judicial determination of the rights of the Hudspeth landowners vis-a-vis those of the upstream private landowners and of the Government to the use of the waters of the Rio Grande River between Elephant Butte Dam and Fort Quitman. Plaintiffs pray for declaratory judgment and for injunction restraining interference with plaintiffs' vested water rights by defendant Reclamation officials.

As authority for joining the United States Government as a party defendant, plaintiffs rely upon the Consent Statute above quoted. The District Court and the Court of Appeals held however, that the Consent Statute should be so construed as to grant no consent to this action, and dismissed the complaint for lack of jurisdiction.

F. Jurisdiction of United States District Court

This action was commenced in the state court and was removed to the United States District Court pursuant to 28 U.S.C. Section 1442(a)(3).

G. Reasons for Allowance of the Writ

In countless thousands of streams throughout the arid West, the Federal Government claims, through

its many agencies and activities, some species of right or interest in the water. This case presents for decision the question of whether the Congress has, by the broadest of language, succeeded in conferring upon the citizens of this country the effective power to obtain judicial determination of their rights to the use of water where conflicting federal claims may be involved.

The language of the Consent Statute is of the broadest: It unequivocally grants consent to join the United States as a defendant in **"any suit"** for the adjudication (or administration) of water rights.

The statute imposes no conditions as to parties except that the United States be a necessary party. To the unsophisticated eye, seeking only the meaning set forth in the words of the statute, the statute very plainly grants consent to join the United States in **any suit** wherein is sought a judgment which will determine water rights or control the distribution of water thereunder.

The Court of Appeals held, however, that the words, "any suit" do not mean "any suit" but means "only a suit" so framed as to bring personally before the Court all the users on the stream—an impossible test to meet for drouth-stricken farmers on a river flowing through three states, the waters of which are used by many thousands of persons in each state.

Although the scope of the consent which the Court of Appeals would recognize is not defined, it is clear that the Court of Appeals would deny consent (a)

in any controversy not involving all water users on the stream, and (b) in any controversy wherein the parties interested are so numerous as to render it impractical to bring them all before the court. In short the Court of Appeals would limit the Consent Statute to general controversies involving all water rights on very short or slightly utilized streams.

This holding of the Court of Appeals is squarely contrary to the decisions of this Court in *United States v. Aetna Casualty & Surety Co.*, 388 U.S. 336; *United States v. Yellow Cab Co.*, 340 U.S. 543; and *Indian Towing Company v. United States*, 350 U.S. 61, wherein this Court held that consent statutes should be liberally construed so as to effectuate their purpose:

> "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced." 340 U.S. 554; 338 U.S. 383.

As authority for its conclusion that the statutory consent extends only to cases so framed that all the water users on the stream be necessary parties, the Court of Appeals relied upon an excerpt from the opinion of the Court of Appeals for the Ninth Circuit in *People of the State of California v. United States*, 235 F. 2d 647, 663. That case, however, did not involve construction of the Consent Statute, and the actual decision of the Ninth Circuit is in clear conflict with the decision of the Fifth Circuit in the case at bar.

In the California case, the United States brought suit to determine and protect, as against all adverse claimants, its rights to the use of the waters of the Santa Margarita River, a coastal stream which drains a watershed within two counties in California. All adverse claimants to the waters of the stream were joined as parties, and the trial court entered a Pre-Trial order dispensing with the filing of cross pleadings but achieving the same effect. 108 F. Supp. at 75. On motion by the Government a separate trial was then had as to Santa Margarita Water Company, the weakest of the adverse claimants, and the State of California. Thereupon, the district court entered judgment in favor of the Government and against Santa Margarita and the State in "sweeping terms." Specifically it held (a) that the United States had perfected prescriptive title as against all the world to its previous military use of waters of the river, and (b) that there were no surplus waters available for appropriation, under the laws of California, from the Santa Margarita River system.

This judgment was reversed by the Court of Appeals for the Ninth Circuit. The Court of Appeals cited the Consent Statute (n. 4, 235 F. 2d at 653) for the proposition that the district court had jurisdiction to adjudicate the rights of the private users as against the Government on their counter claims. The Court of Appeals then indicated (at 654) that the severance for separate trial of the Government's case against one adverse claimant,

if adequately limited, would have been perfectly proper:

> "The Government apparently desired to try Santa Margarita because it was obviously in the weakest position of any prospective user of the stream. This was, of course, perfectly proper, and this court has affirmed the trial judge in the exercise of his discretion. But no license was accorded thereby to enter judgment in such sweeping terms."

But the Court went on to condemn (at 663-664) and to describe as "somewhat shocking" the trial court's judgment that the United States had perfected a prescriptive right, not only as against the parties to the separate trial, but as against all the world:

> "Besides the damage to Santa Margarita * * *, the rights of others interested in the flow of the stream were prejudged before they had been tried, by sweeping declarations of the judgment in favor of the contentions of agents and attorneys for the Government. This was an abuse of discretion."

That is, on the trial of the Government's severed case against two adverse claimants, the trial court entered judgment for the Government in such "sweeping terms" as to prejudge the cases against the Government of other adverse claimants to the water of the stream. This the Court of Appeals for the Ninth Circuit held to be improper.

Compare now the case of the Rio Grande. At the same time that it has zealously resisted the attempts

by the Hudspeth farmers to obtain judicial determination of their water rights, the United States Government has joined with the El Paso District in bringing suit against a single adverse claimant—the City of El Paso—to the use of the waters of the upper Rio Grande in Texas. *El Paso District together with the United States v. City of El Paso*, 133 F. Supp. 894, affirmed by Fifth Circuit, F. 2d , petition for certiorari pending as No. 1096 of 1956 October Term (filed June 1957). In this suit the Government secured a sweeping pronouncement of infinitely greater scope than that criticized in the California case, to-wit, **that by the Rio Grande Compact of 1939, all the Texas share of the waters of the upper Rio Grande were "definitely committed to the service of the Rio Grande Project [i. e., irrigators within El Paso County.]"** Neither the Hudspeth farmers nor any other Texas water users nor the State of Texas were parties to the case. The appeal from this judgment of the same trial court was heard on the same day as the case at bar by the same panel of the Court of Appeals for the Fifth Circuit. So far from requiring hearing on the merits for all claimants to the rights to use these waters in controversy, the Court of Appeals for the Fifth Circuit simultaneously (a) affirmed this sweeping seizure for the Government Project of all the Texas share of the waters of the upper Rio Grande (F. 2d), and (b) refused to let the Hudspeth farmers, or any other adverse claimants whom the Government does not of its own volition choose to sue, **ever** be heard under **any** docket number to challenge the seizure.

Petitioners submit that the Fifth Circuit has in these two cases **approved** precisely what the Court of Appeals for the Ninth Circuit **condemned.** *California v. United States*, so far from justifying the judgment below, presents a square conflict in decision which should be resolved by the Supreme Court of the United States.

As a second and overlapping ground for its decision that the statutory consent does not extend to the case at bar, the Court of Appeals holds that this is not a suit for adjudication of water rights because the adverse claimants to the waters in controversy are not all personally joined as parties defendant.

All the waters in controversy are in the physical possession and control of the defendant Reclamation officials. The injunction which plaintiffs seek against such officials would reduce the quantity of water available to satisfy adverse claims upstream. The Court of Appeals cites Texas cases which hold that, because such an injunction would affect property in which they are interested, the adverse claimants are necessary parties to the injunction suit. Plaintiffs did join all such adverse claimants by representation in a class action. But the Court of Appeals further holds that joinder in a class action does not dispense with personal joinder of the adverse claimants to the water.

This holding, which would greatly reduce the scope of Rule 23 of the Federal Rules of Civil Procedure, is in square conflict with the holding of the

Court of Appeals for the Second Circuit in *Dickinson v. Burnham*, 197 F. 2d 973. There a class action was brought on behalf of all stockholders of a corporation to impress a constructive trust upon secret profits realized by the corporation's officers. By interlocutory order following trial, the district court determined the amount of the secret profits, impressed the constructive trust on funds in that amount, and held that all stockholders of the corporation were entitled to participate therein. The district court then permitted members of such class to intervene and to present appropriate claims to share in the entrusted funds. Many, but not all, members of the class did so. The district court then entered final judgment in favor of each of the intervenors for a pro rata portion of the entrusted funds, thereby disposing entirely of the same. The mulcted officers appealed, asserting that it was improper for the trial court to permit such intervention after the trial and then to dispose of the entire fund in the absence of all stockholders who would have an interest therein.

The Court of Appeals for the Second Circuit affirmed the action of the district court. The Court of Appeals pointed out that the three categories of class action referred to in Federal Rule 23 are frequently called "true", "hybrid", and "spurious" class actions, respectively; and that it was quite proper, under Rule 23(a) (2), for the district court to impose a constructive trust, to determine the amount thereof, and dispose of the entire fund so held on constructive trust in a class action without the per-

sonal joinder of all claimants to the fund. Said the Court:

> "As to this specific question, we are quite clear that the present suit falls neatly within subdivision (2) of the rule [Rule 23], dealing with the disposition of a fund, and that the Court had full power to deal with it as it did * * *."

That is, the Second Circuit holds that a controversy as to property may be decided, and the property disposed of, in a class action where the absent claimants are to numerous to bring them all personally before the court. The Fifth Circuit holds in the case at bar that such a class action cannot proceed: if the interested claimants are too numerous for personal joinder, the Federal Courts are helpless, and the defendant must prevail.

Comparable to *Dickinson* is *Montezuma Canal Co. v. Smithville Canal Co.*, 218 U.S. 371. The Supreme Court there considered the effect of a prior injunction in a previous water rights case to which only the canal companies had been parties. The prior injunction had restrained the defendant canal companies "and all persons claiming under them" from diverting water so as to prevent a stated flow from entering the head gate of the plaintiff canal company. In holding the prior decree to be *res judicata*, this Court first held that the rights of the individual water users receiving water through the canals were bound by the prior decree:

> "We premise that the Montezuma Canal Co. and the defendant individuals and canal com-

panies in Action No. 505, whether viewed as appropriators of water or as mere carriers for others, sufficiently represented the users of the waters of the respective canals to cause such water users to be bound by the judgment. [Citing cases]."

This case then is a square holding that the rights of individual water users in respect to the water supply may be bound by judgment against representative parties, at least if the judgment effectively controls interference with the water. It follows, *a fortiori*, that it was proper in the prior suit for the injunction to issue, even though the individual water users affected were not all personally joined. The decision of the court below cannot be reconciled with the decision of this Court in *Montezuma*.

Has the Congress succeeded in granting consent to joinder of the United States in "any suit" for adjudication of water rights? Or is the Consent Statute to be emasculated by refining "any suit" to mean "only a suit" to determine all water rights on a very short stream wherein all the water users conveniently can be personally joined?

Is it possible for a Federal court to decide a water rights case on a long stream or where a large number of individual water users may be affected? Or are the powers of the Federal judiciary so shackled by its rules as to necessary parties and class actions that removal to Federal court must be equated with victory for the defendant, regardless of the merits of plaintiff's case?

The court below, by denying trial on the merits, resolved these crucial questions in a manner conflicting with prior decisions of sister circuits and of this Court.

WHEREFORE, these petitioners pray the Supreme Court to issue a writ of certiorari.

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July, 1957

Appendix: Opinion of Court Below

In The
UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 16135

RONALD MILLER, ET AL.,
Appellants,
versus
ROBERT W. JENNINGS, ET AL.,
Appellees.

Appeal from the United States District Court for the Western District of Texas.

(April 12, 1957.)

Before HUTCHESON, Chief Judge, and CAMERON and JONES, Circuit Judges.

JONES, Circuit Judge: Again this court has for decision another of the frequently recurring controversies resulting from the drouth in the water-

shed of the upper Rio Grande. The appellants, who were plaintiffs below, are Hudspeth County Conservation & Reclamation District No. 1, municipal corporation under Texas law; and five individuals who are landowners and water users in the Hudspeth District, and who assert that they are members of and represent a class of about 90 other landowner water users in the District. They brought an action in the District Court of Hudspeth County, Texas, against Robert W. Jennings, Regional Director of the Bureau of Reclamation, W. F. Resch, Project Manager of the Rio Grande Reclamation Project; El Paso County Water Improvement District No. 1, a Texas municipal corporation lying northwesterly of and upstream from the Hudspeth District; N. B. Phillips, Manager of the El Paso District; eleven individuals resident in Texas who are the owners of land below the Elephant Butte Dam and above the El Paso-Hudspeth County line claiming irrigation rights in the waters of the Rio Grande and alleged to represent over a thousand others, some residents of Texas and some residing in New Mexico, who are of like situation; and against the United States.

The Rio Grande Reclamation Project, as appears from the record before us, is operated by the United States for the purpose of impounding and distributing the waters of the upper Rio Grande, primarily for irrigation purposes. The waters are impounded at Elephant Butte Dam in Elephant Butte Reservoir, about 125 miles north of and upstream from the City of El Paso. The waters are distributed

through a series of ditches. Seepage and return flow waters are used and sometimes reused. The project serves an area extending from the dam and reservoir to or nearly to Fort Quitman, Texas, about 85 miles southeast of and downstream from El Paso. Nearly all the lands served or intended to be served by the Project are within the confines of an irrigation district, of which there are three in number. The farthest upstream of these is the Elephant Butte Irrigation District of New Mexico, lying wholly in New Mexico. The farthest downstream of the districts is the Hudspeth District, a plaintiff in this action, situated in Hudspeth County, Texas. Between these is the El Paso District, a defendant, situate in El Paso County, Texas.

The action, instituted in the District Court of Hudspeth County, Texas, was removed to the United States District Court for the Western District of Texas pursuant to 28 U.S.C.A. §§1441, 1442, 1446.

Seeking declaratory and injunctive relief, the plaintiffs by their petition assert that there are seven controversies between them and the defendants. The totality of the averments sets forth the plaintiffs' claim that they have rights to water of which they are being or will be deprived by or through acts and conduct of the defendants. Of these controversies the first is as to the effect of and priorities under the laws of Texas relating to appropriative water rights; the second relates to rights in drainage waters; the third raises the question as to whether methods of financing of facilities can affect

water rights; the forth and fifth call for construction of the Warren Act, 43 U.S.C.A. §523 et seq; the sixth asserts that the upper Rio Grande usually has a normal measurable flow to which riparian rights attach; and by the seventh it is contended that the consumption of water for generating electric power is an unlawful invasion of the rights of users of water for irrigation. Motions to dismiss were filed by all defendants and a number of grounds were assigned, among them being the ground that the United States had not consented to be sued nor in any way waived its sovereign immunity from suits of the character here involved. On this ground the motion was sustained and the plaintiffs' complaint was dismissed. The other grounds of the motions were not passed upon. Whether the district court erred in dismissing the complaint is the question presented to us on this appeal.

Substantially the same relief was sought by substantially the same plaintiffs in a suit against the Regional Director of Reclamation, the Project Manager, individuals as class representatives of land-owning water users and against El Paso County Water Improvement District No. 1. The suit was disposed of by the direction of this Court that it be dismissed for want of jurisdiction because it was, in essence, a suit against the United States which had not given its consent to being sued. *Hudspeth County Conservation & Reclamation District No. 1 v. Robbins*, 5 Cir. 1954, 213 F. 2d 425. In the case before us the United States is named as a defendant and its waiver of immunity from suit

is asserted under an Act of Congress of 1953 by which it is provided:

> "Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subjected to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit." 43 U.S.C.A. § 666.

The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande *only in a proceeding where all persons who have rights are before the tribunal.* The Ninth

Circuit Court of Appeals has most succinctly stated the doctrine in this manner:

> "The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershead and all appropriators who use water from the streams involved in another watershed in court at the same time." *People of the State of California v. United States*, 9 cir. 1956, 235 F. 2d 647, 663, See *Pacific Live Stock Co. v. Lewis*, 241 U. S. 440, 36 S. Ct. 637, 60 L. Ed. 1084.

The same rule has been announced by the Texas courts, It has been held that:

> "It would be contrary to the fundamental principles of justice to enjoin the diversion and delivery of the water by the water district to these persons, thereby depriving them of its use, without their joinder in the suit, and being afforded an opportunity to assert and protect their rights. Such procedure would be contrary to the rule quoted, for they are interested in the object of the suit, and such a decree would directly affect their interests." *Wilson v. Reeves County Water Improvement District No. 1*, Tex. Civ. App., 256 S.W. 346, 347. See *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S.W. 733, 107 Am. St. Rep. 653, 70 L.R.A. 964.

We are of the belief that the proceeding is not a suit for the adjudication of "rights to the use of water of a river system or other source". The United States was improperly joined and is a necessary party for a determination of the issues persented.

The order of dismissal was properly entered and will be affirmed.

It is urged by the plaintiffs that all persons having any interest in the subject matter of the suit are parties to the suit or are members of a class represented by parties to the suit. The same contention was ably argued, carefully considered, and rejected in *Martinez v. Maverick County Water Control and Improvement District No. 1*, 5 Cir. 1955, 219 F. 2d 666. There, as here, a suit was brought for a declaratory judgment as to water rights. There the plaintiffs asked for a decree reserving the right to plaintiffs to apply for injunctive relief. Here the plaintiffs pray for a declaration of their rights and for an injunction. This difference does not create a distinction. There it was said:

> "The declaratory judgment would be binding only on those parties actually before the court; each new party asserting his rights in the water of the river, in the same or any other court, would have the right to relitigate the questions already adjudged as between those before the court." *Martinez v. Maverick County Water Control and Inprovement Dist. No. 1*, 5 Cir. 1955, 219 F. 2d 666, 672.

The district court did not consider nor do we need consider the other questions raised. The district court's judgment is

AFFIRMED

CAMERON, Circuit Judge, dissenting.

Appendix: Judgment of Court Below

Extract from the Minutes of April 12, 1957

RONALD MILLER, ET AL.,

No. 16135 versus

ROBERT W. JENNINGS, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Ronald Miller, and others, and the sureties on the appeal bond herein, American Employers' Insurance Company, Hal Daugherty and Al W. Uhlig, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.